TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement	3
Argument	4
I.	
The Writ Of Certiorari Should Not Be Granted	4
II.	
Response To Petitioner's Arguments	5
A. Primary Jurisdiction Properly Rests In The CEC Under Its General Regulatory Powers And Under 7 U.S.C. §13c(b), Which Gives It Discretion Not To Report Minor Violations	5
1. A Specific Statutory Provision to the Contrary Is Not Necessary To Divest the United States District Courts of Exclusive Jurisdiction of Antitrust Actions	5
2. The Commodity Exchange Act Authorizes the Secretary of Agriculture To Grant Immunity and Provide Exemptions from the Antitrust Laws and Make Determinations Regarding Antitrust Questions	5
B. The Regulatory Scheme Of The Commodity Exchange Act Is So Pervasive As To Include Antitrust Questions	8
C. The Administrative Agency Has The Power To Grant Relief To The Petitioner	12
1. Petitioner Has Standing Before the CEC	12

2. The Fact that the Agency Cannot Grant Damages Does Not Preclude the Agency from Hearing the Case 12

3. Reference to the CEC Is Necessary To Maintain Uniformity of Agency Policy 12

4. This Case Requires the CEC's Expertise 12

D. The Question Of Whether Defendants' Actions Were Arguably Lawful Is Not Reached In This Case 15

Conclusion 18

Appendix:

Commodity Exchange Act, Pertinent Provisions .. 1a-5a

CITATIONS

Cases

Allied Air Freight, Inc. v. Pan American World Airways, Inc., 393 F. 2d 441 (2d Cir. 1968) 13, 17

Breen Air Freight, Ltd. v. Air Cargo, Inc., 1971 CCH Trade Cases ¶73,775 (S.D. N.Y. 1971) 14, 17

California v. Fed. Power Comm'n, 369 U.S. 482 (1962) 9

Carnation Co. v. Pacific Conference, 383 U.S. 213 (1966) 15, 16

Crain v. Blue Grass Stockyards Company, 399 F. 2d 868 (6th Cir. 1968) 11

Denver Union Stockyard Co. v. Denver Livestock Com'n Co., 404 F. 2d 1055 (10th Cir. 1968), cert. den. 394 U.S. 1014 (1969) 11

Far East Conf. v. United States, 342 U.S. 570 (1952) 16

Marnell v. United Parcel Service of America, Inc., 260 F. Supp. 391, 412 (N.D. Cal. 1966) 17

McKeon Construction v. McClatchy Newspapers, 1970 CCH Trade Cases ¶73,212 (N.D. Cal. 1969) 10
Milk Producers Assn. v. U. S., 362 U.S. 458 (1960) .. 9
Pan American World Airways v. U. S., 371 U.S. 296, 311-312 (1963) 14
Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 3, 4, 6, 7, 12, 18
Thill Securities Corp. v. New York Stock Exchange, 433 F. 2d 264, 268-269 (7th Cir. 1970), cert. den. 401 U.S. 994 (1971) 6, 7, 12
Trans World Airlines, Inc. v. Hughes, 214 F. Supp. 106 (S.D. N.Y. 1963), aff'd 332 F. 2d 602 (2d Cir. 1964) 13, 14
U.S. Nav. Co v. Cunard S.S. Co., 284 U.S. 474 (1932) 16
United States v. Borden Co., 308 U.S. 188 (1939) 9
United States v. R.C.A., 358 U.S. 334, 348 (1959) 8, 10
United States v. Western Pac. R. Co., 352 U.S. 59, 63-64 (1956) 6

Statutes And Regulations

C.F.R., Title 17, §§0.3, 0.53 ..... 7, 12
Commodity Exchange Act, 7 U.S.C. §7 ..... 9, 1a
Commodity Exchange Act, 7 U.S.C. §§ 7a, 8 9
Commodity Exchange Act, 7 U.S.C. §§9, 12a 9, 1a, 3a
Commodity Exchange Act, 7 U.S.C. §13a 5
Commodity Exchange Act, 7 U.S.C. §13c(b) 5, 7, 9, 13, 15, 18
Packers and Stockyards Act, 7 U.S.C. §225 11

Other Authorities

Kestenbaum, Primary Jurisdiction to Decide Anti-trust Jurisdiction: A Practical Approach to the Allocation of Functions, 55 Geo. L.J. 812, 820 (1967) 7

In The

Supreme Court of the United States

October Term, 1971

THOMAS RICCI,

Petitioner,

vs.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING CO., INC., a corporation, and JOSEPH E. SIEGEL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

BRIEF FOR RESPONDENTS, THE SIEGEL TRADING CO., INC., a corporation, and JOSEPH E. SIEGEL, IN OPPOSITION

OPINIONS BELOW.

The decision of the United States District Court for the Northern District of Illinois, Civil Action No. 69 C 1030 (1970) (unpublished), the opinion of the United States Court of Appeals for the Seventh Circuit, 447 F. 2d 713 (7th Cir. 1971) (not 414 F. 2d 713 as cited in the Petition),

and the order of the Court of Appeals, sitting *en banc*, denying the Petition for Rehearing on the Issue of Primary Jurisdiction (unpublished), appear in Petitioner's Appendix.

JURISDICTION.

These Respondents do not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED.

The questions presented are not those set forth by the Petitioner. The Statement of the Case and the Petitioner's argument in fact indicate the questions are as follows:

1. Whether, having found that a complaint property alleges group boycott, a per se violation of Section 1 of the Sherman Act (15 U.S.C. §1), by a commodities exchange, its officers and a member, the Court of Appeals erred in ordering that the proceedings be stayed until such time as the Commodity Exchange Commission and/or the Secretary of Agriculture may act upon it.

2. Whether the Commodity Exchange Act provides a partial exemption from the antitrust laws to commodity exchanges and members thereof and gives the Commodity Exchange Commission and/or the Secretary of Agriculture power to exercise primary jurisdiction.

STATUTORY PROVISIONS INVOLVED.

Petitioner's statement of the statutory provisions involved and exposition of them in the appendix are substantially correct.

STATEMENT OF THE CASE.

Petitioner's statement of the case is substantially correct with one exception. The question of primary jurisdiction was alluded to during the oral argument during the discussion of *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963).

ARGUMENT.

I.

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

The instant case presents no questions of novelty or uniqueness which would require the granting of the writ of certiorari. The only manner in which this case differs from the traditional primary jurisdiction case is that the nature of the CEC's regulation is not so detailed as that of agencies such as the Interstate Commerce Commission and Civil Aeronautics Board, which oversee rates, routes and acquisitions. The Court of Appeals' decision was a natural outgrowth of *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), wherein this Court took cognizance of the regulatory authority of the Securities and Exchange Commission and the New York Stock Exchange and the relationship of their powers to the antitrust laws.

The spectrum of pending District Court cases cited by Petitioner in no way differs from the spectrum of cases involving the relationship of primary jurisdiction to any other regulatory agency. In each case, the ruling depends upon the facts of the case and their application to the Commodity Exchange Act. The outcome of those cases in no way depends upon the outcome of this case.

II.

RESPONSE TO PETITIONER'S ARGUMENTS.

A.

Primary Jurisdiction Properly Rests In The CEC(*) Under Its General Regulatory Powers And Under 7 U.S.C. §13c(b), Which Gives It Discretion Not To Report Minor Violations.

1. A Specific Statutory Provision to the Contrary Is Not Necessary To Divest the United States District Courts of Exclusive Jurisdiction of Antitrust Actions.

2. The Commodity Exchange Act Authorizes the Secretary of Agriculture and the CEC To Grant Immunity and Provide Exemptions from the Antitrust Laws and Make Determinations Regarding Antitrust Questions.

The Commodity Exchange Act, 7 U.S.C. §§ 13a and 13c(b), provides as follows:

> 13a. If any contract market is not enforcing or has not enforced its rules of government . . . or any director, officer, agent, or employee of any contract market otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations or orders of the Secretary of Agriculture or the commission thereunder, the commission may, upon notice and hearing and subject to appeal as in other cases provided for . . . make and enter an order that such contract market, director, officer, agent, or employee shall cease and desist from such violation. . . .
>
> 13c(b) Nothing in this chapter shall be construed as requiring the Secretary of Agriculture or the

(*) The Commodities Exchange Commission and/or the Secretary of Agriculture are referred to for convenience herein as the CEC.

commission to report minor violations of this chapter for prosecution, whenever it appears that the public interest does not require such action.

Primary jurisdiction applies where "a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States* v. *Western Pac. R. Co.*, 352 U.S. 59, 63-64 (1956). Contrary to Petitioner's contention, a specific statutory provision to the contrary is not necessary to divest the United States District Courts of exclusive jurisdiction of antitrust actions. See *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963).

For the court to decide whether to invoke the doctrine of primary jurisdiction requires "an *analysis* which reconciles the operation of both statutory schemes . . . (here the antitrust laws and the Commodity Exchange Act) with one another rather than holding one completely ousted. . . . That general power to adopt rules relating to the relations of its members with non-members, however, does not in and of itself place the application of such rules outside the reach of the antitrust laws. Rather it is at this point that the analysis of reconciliation really begins." *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264, 268-269 (7th Cir. 1970), cert. den. 401 U.S. 994 (1971).

Though Petitioner contends that repeal of antitrust laws by implication in a regulated industry is not favored, he fails to point out the proper circumstances where such a

repeal may be made. The instant case clearly comes within the four requirements of *Thill Securities*, as set forth by the Court of Appeals in its decision below.

The Court of Appeals' analysis that the general jurisdiction of the CEC and the discretion of the CEC and Secretary of Agriculture not to report minor violations under §13c(b) implies an antitrust exemption or at least the granting of discretion to deal with antitrust questions is correct. The amendment was enacted in 1968, after the *Silver* case and most of the leading cases dealing with primary jurisdiction were decided. It was part of the first major amendment since the original Commodity Exchange Act was enacted in 1936, prior to the major developments in the case law of the doctrine of primary jurisdiction. A legislative intent to increase the powers of the CEC in this area can therefore be implied. The first requirement of *Thill*, the commission's power to weigh antitrust policy in fulfilling its duty of review of exchange self-regulation, is thus met. That the second requirement of *Thill*, the ability of the aggrieved party to initiate Commission review under Title 17, C.F.R. §§0.3 and 0.53, is present, was sufficiently demonstrated by the Court of Appeals in its opinion.

It is clear that commission expertise would be useful in resolving the issues since the CEC may be presumed to have a familiarity with the rules of the Defendant-Chicago Mercantile Exchange (CME). That the CEC could take antitrust principles into account, the fourth guideline of *Thill*, was also aptly demonstrated by the Court of Appeals.

In Kestenbaum, *Primary Jurisdiction to Decide Antitrust Jurisdiction: A Practical Approach to the Allocation of Functions*, 55 Geo. L. J. 812, 820 (1967), it is stated:

"Acknowledging the Court's complete responsibility when no agency exists and its ultimate control in all cases, why ignore the views of the expert body when available? In other contexts, it is often said that *an agency's views of its own statute is entitled to considerable weight* (italics added), even though the question of interpretation is ultimately for the courts. So here, it may be said that the agency's exposition of the objectives of the regulatory scheme, and of the needs which have become apparent in its administration, is relevant to their compatibility with antitrust rules, as well as to the existence and scope of antitrust immunity.

"There is of course no trace of such dialogue in any case except *Jewel Tea.* [*Meat Cutters* v. *Jewel Tea,* 381 U.S. 676 (1965).] That decision suggests that there may yet be cases calling for reference to a regulatory agency of issues of antitrust jurisdiction hinging upon interpretation of regulatory statutes."

It is clear that this is such a case.

B.

The Regulatory Scheme Of The Commodity Exchange Act Is So Pervasive As To Include Antitrust Questions.

As our society and the apparatus of government become more complex, so the doctrine of primary jurisdiction evolves beyond its original restrictiveness. Since most of the cases have dealt with problems of regulatory agencies dealing with rates and routes, necessarily the law on the subject has been stated in that limited context. See *United States* v. *R.C.A.,* 358 U.S. 334, 348 (1959). However, when the doctrine is applied to a regulatory agency which is not of the nature of the Interstate Commerce Commission or

Civil Aeronautics Board, the language necessarily describing the relationship of the doctrine to those latter bodies should not restrict the application of the doctrine to another type of regulatory agency, such as the CEC.

The CEC and Secretary of Agriculture have as complete and pervasive authority to regulate free competition in their industry as the other regulatory agencies have in their industries. The Secretary of Agriculture has the power to authorize and designate a board of trade as a contract market (7 U.S.C. §7); to pass on all by-laws, rules, regulations and resolutions of a contract market (7 U.S.C. 7a); to suspend a contract market for not enforcing its own rules (7 U.S.C. §8); to register traders on a contract market and to order certain traders to desist from trading on a contract market (7 U.S.C. §§9, 12a). Thus the Secretary of Agriculture has the power to control who shall engage in the commodity futures trading business and has jurisdiction over any violation by a contract market of its own membership rules by virtue of §§7a and 8. Since Petitioner alleges a violation of the rules of the Defendant-CME, the Secretary of Agriculture has primary authority under 7 U.S.C. §13c(b) to withhold reporting of the violation.

California v. *Fed. Power Comm'n*, 369 U.S. 482 (1962), cited by Petitioner, does not even deal with the "pervasive regulatory scheme" question. The Court found that a specific provision of the Clayton Act specifically provided that the Federal Power Commission cannot enforce the antitrust laws and that thus the FPC, in a prior administrative ruling, had usurped its powers.

Milk Producers Assn. v. *U.S.*, (cited by Petitioner as *Maryland and Virginia Milk Producers Ass'n* v. *United States*), 362 U.S. 458 (1960), and *United States* v. *Borden*

Co., 308 U.S. 188 (1939), did not touch the pervasive regulatory scheme issue. In these cases, an agricultural cooperative was given a statutory antitrust exemption to make agreements to process, handle and market agricultural produce for its producer members, subject to the approval of the Secretary of Agriculture. The Court held that this statute did not thereby grant an antitrust exemption and confer on the Secretary of Agriculture jurisdiction over a monopolistic agreement between such a cooperative and another entity involved in another step in the chain of distribution of the produce.

United States v. *R.C.A.*, 358 U.S. 334 (1959), also was cited by Petitioner to support his contention that a pervasive regulatory scheme is necessary for the invocation of primary jurisdiction. The case involved a Government suit for divestiture after an exchange of television stations which the Federal Communications Commission had approved. The Court studied the legislative history of the Communications Act and found that the legislative history specifically stated that the FCC had no authority to pass on antitrust violations as such.

McKeon Construction v. *McClatchy Newspapers*, 1970 CCH Trade Cases ¶73,212 (N.D. Cal. 1969), merely followed *R.C.A.* In *R.C.A.*, there was no discretion involved. Petitioner's attempt to limit the doctrine to carrier cases by quoting from *R.C.A.* is incorrect. Most of the older cases were in fact carrier cases, simply because the ICC was the first, or one of the first, regulatory agencies. The ICC's regulation of its industry might be more "pervasive" in the sense of being more detailed than the CEC's, but this is merely because of the nature of the industry. Yet the CEC's *authority* to control its industry and to determine

who will compete in its industry as a broker and as an exchange is just as complete as the ICC's and the extent of its regulation is just as pervasive.

Petitioner's citation of *Denver Union Stockyard Co.* v. *Denver Livestock Com'n Co.*, 404 F. 2d 1055 (10th Cir. 1968), cert. den. 394 U.S. 1014 (1969) is inapposite because the case was decided on an interpretation of the Stockyards and Packers Act. The Act specifically states that nothing therein shall create an exemption from the Sherman or Clayton Acts. 7 U.S.C. §225. The fact that stockyards and commodity exchanges are both under the authority of the Secretary of Agriculture does not make the Packers and Stockyards Act of 1921 and the Commodity Exchange Act analogous. Furthermore, the Court, in *Denver Union Stockyard*, stated that there is no fixed formula for the application of the doctrine of primary jurisdiction. 404 F. 2d at p. 1056.

Crain v. *Blue Grass Stockyards Company*, 399 F. 2d 868 (6th Cir. 1968), cited by Petitioner, which also turned on a construction of the Packers and Stockyards Act, recognizes the evolution of the doctrine from rate cases involving carriers to technical questions which require administrative expertise. In the instant case, the Court decided that interpretation of Defendant-CME's rules requires the administrative expertise of the CEC.

C.

The Administrative Agency Has The Power To Grant Relief To The Petitioner.

1. **Petitioner Has Standing Before the CEC.**
2. **The Fact that the Agency Cannot Grant Damages Does Not Preclude the Agency From Hearing the Case.**
3. **Reference to the CEC Is Necessary To Maintain Uniformity of Agency Policy.**
4. **The Case Requires the CEC's Expertise.**

Plaintiff's contention that he is without right to appear before the administrative agency is without merit when considered in the light of Title 17, C.F.R. §§0.3 and 0.53, which provide that "any interested person having any information of any violation of the act" may file an application requesting the institution of proceedings before the Secretary or the Commission. To term the Commission as impotent because it has the discretion to exclude him is a contradiction in terms. If the Commission excludes him improperly, Petitioner can always appeal.

The fact that an agency does not have the power to award damages does not prevent the application of the doctrine of primary jurisdiction. *Silver* v. *New York Stock Exchange, supra; Thill Securities Corp.* v. *New York Stock Exchange, supra.* If that were the case, the doctrine never would have taken root and developed.

Petitioner argues that there is no power in the CEC or the Secretary to exempt Defendants or either of them from the operation of the antitrust laws. Yet no law is cited in support of this proposition. The cases cited by Petitioner merely state as *dicta* that since an administrative agency did not have the power to award damages, primary juris-

diction would not lie. The reasoning employed by Petitioner is circular. It is implicit in the cited cases that the court first grappled with the dispositive question of whether there was partial antitrust immunity and decided this question in the negative. On the other hand, if there be partial antitrust immunity, as there is in this case, then Petitioner is not entitled to damages and the question of the agency's power to award them is moot.

For example, in *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F. 2d 441 (2d Cir. 1968), cited by Petitioner, the Court held that Plaintiff did not have to exhaust his administrative remedies before an administrative agency which had no power to grant the relief sought, and that the alleged anticompetitive agreement did not have Civil Aeronautics Board (CAB) approval and thus was not exempt from the antitrust laws. On the contrary, in the instant matter the CEC has jurisdiction over the parties, Petitioner had an opportunity to have a CEC hearing, and the activity was exempt from the antitrust laws under §13c(b).

Trans World Airlines, Inc. v. *Hughes*, 214 F. Supp. 106 (S.D. N.Y. 1963), aff'd 332 F. 2d 602 (2d Cir. 1964), dealt with a statute that declares it unlawful, without CAB approval, for anyone engaged in a phase of aeronautics to acquire control of an air carrier, and that with such CAB approval, the acquisition is exempt from the antitrust laws. Defendant was a manufacturer of aircraft. Pursuant to CAB approval, it acquired control of TWA. Subsequently, Defendant committed antitrust violations by economically coercing TWA to purchase only Defendant's aircraft. The Court held that these acts were not the type of acts over which the CAB had primary jurisdiction; that the CAB

only has jurisdiction over the acquisition itself, "rather than the broad range of activities into which the controller may enter thereafter." 332 F. 2d at p. 608. After the acquisition, the CAB retains jurisdiction over the air carrier, but not over the company that owns controlling stock in the air carrier. The Court's statement that the Board is unable to grant damages is a *non sequitur* and *dicta*. Under the proper set of facts, this inability should not preclude primary jurisdiction.

In *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.*, 1971 CCH Trade Cases ¶73,775 (S.D. N.Y. 1971), Defendant was a freight forwarding company owned by seventeen certified air carriers. Defendant had hired Plaintiffs to handle its freight and then discharged Plaintiffs and hired its own subsidiary. Defendant had been established with CAB approval, but its subsidiary had not. The court held at p. 91273: "While an express finding of immunity from the antitrust laws may not be necessary to confer immunity, the record does not support continued surveillance of the activities of Air Cargo, Inc., itself acting on its own, to be distinguished from broader, over-all scrutiny of such conceded areas of traditional CAB expertise such as tariffs." The Court followed the reasoning of *TWA*.

Contrary to Petitioner's position, *Pan American World Airways* v. *U.S.*, 371 U.S. 296, 311-312 (1963), recognized that the "[Civil Aeronautics] Board has no power to award damages or to bring criminal prosecutions. Nor does it, as already noted, have jurisdiction over every antitrust violation by air carriers. But where the problem lies within the purview of the Board, as do questions of division of territories, the allocation of routes, and the affiliation of common carriers with air carriers, *Congress must have intend-*

ed to give it authority that was ample to deal with the evil at hand (italics added). In *Carnation Co.* v. *Pacific Conference* 383 U.S. 213 (1966), this Court merely held that Defendant's actions were not exempt from the antitrust laws by virtue of the Shipping Act and that therefore Plaintiff could recover damages in a legal action.

Petitioner contends that primary jurisdiction may be invoked only when uniformity of agency policy is in question, and that there is no potential repugnance between a possible decision of the CEC and the award of treble damages in an antitrust action. Yet, Petitioner fails to recognize that the discretion given to the CEC by §13c(b) not to report minor violations is inconsistent with a punitive award of treble damages.

Furthermore, the CEC has power to oversee membership rules and policies of contract markets, and it is likely the CEC would desire to keep these rules and policies consistent.

The expertise of the agency, which Petitioner denies is present, is the greater familiarity and experience of the CEC with the rules of the Defendant CME and the procedures in the industry.

D.

The Question Of Whether Defendants' Actions Were Arguably Lawful Is Not Reached In This Case.

Petitioner contends that the Defendants' conduct must be arguably lawful under the regulatory statute for primary jurisdiction to attach. However, Petitioner seeks to misshape the "arguably lawful" doctrine into a meaning other than its true one and then cites cases which do not even support the stated proposition.

The "arguably lawful" doctrine merely provides that if a regulatory agency approved the action of the party, that party can interpose said agency approval as a defense in a subsequent judicial antitrust action. The doctrine only applies when there has been a prior hearing before an agency and subsequently the Defendant is subjected to an antitrust suit. However, merely because there was never a prior administrative determination does not mean the Defendant has no defense to the antitrust suit and that primary jurisdiction cannot attach.

Petitioner's statement that the Court below held that the Defendant's conduct is not arguably lawful begs the question. The Court held that the complaint states a cause of action under the antitrust laws *prescinding from* the Commodities Exchange Act and the doctrine of primary jurisdiction but that whether the complaint, taking those two factors into account, states a cause of action, is a question that the Court below held should be answered by the Secretary of Agriculture and/or the CEC.

In *Carnation Co.* v. *Pacific Conference,* 383 U.S. 213 (1966), the Court merely stated that agreements previously approved by the Federal Maritime Commission (FMC) are, *by statute,* exempt from the antitrust laws, but agreements not approved are not exempt. In the instant matter, Defendants never had an opportunity to have a regulatory body determine if their actions were legal.

Far East Conf. v. *United States,* 342 U.S. 570 (1952) and *U.S. Nav. Co.* v. *Cunard S.S. Co.,* 284 U.S. 474 (1932), cited by Petitioner, held that the FMC cannot validate preapproval implementation of such agreements. However, this does not mean that the CEC cannot find that the Defendants' action was within its rules and proper.

The cases cited do not support Petitioner's proposition that the "arguably lawful" doctrine is a necessary element for the invocation of primary jurisdiction in the instant case.

The citation of *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F. 2d 441 (2d Cir. 1968) is also inapposite. Defendants entered into a monopolistic agreement which had not been filed with or approved by the CAB. The Court held that defendants therefore could not argue that the agreement was arguably lawful and the Court refused to grant primary jurisdiction to the CAB.

Marnell v. *United Parcel Service of America, Inc.*, 260 F. Supp. 391, 412 (N.D. Cal. 1966), is directly in support of Defendants' position. The very reason the Court of Appeals remanded the case to the Secretary of Agriculture is because "the conduct in question might be exempt from the antitrust laws by the regulatory agency under some express or plainly implied provision of the regulatory act." In *Marnell*, the Court held that defendants did not receive permission from the state commerce commission to commit the monopolistic acts they committed, and that the state commerce commission and the ICC had no jurisdiction over those types of acts.

In *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.*, 1971 CCH Trade Cases ¶ 73,775 (S.D. N.Y. 1971), the Court held that the CAB did not have jurisdiction to decide the question involved.

Although Congress has encouraged private litigation allowing treble damages, it is clear that §13c(b) of the Commodity Exchange Act, in the light of *Silver*, created an antitrust exemption under the circumstances of the instant case.

CONCLUSION.

For the foregoing reasons, Respondents Joseph E. Siegel and The Siegel Trading Co., Inc., respectfully pray that the Petition for a Writ of Certiorari by Thomas Ricci to review the judgment of the United States Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

MAX CHILL
HERMAN CHILL
CHARLES B. BERNSTEIN
100 W. Monroe Street
Chicago, Illinois 60603

Counsel for Respondents, The Siegel Trading Co., Inc., a corporation, and Joseph E. Siegel

APPENDIX

The Commodity Exchange Act (7 U.S.C. §7 et. seq.) provides in pertinent part:

"§7. *Duties of contract market*

Each contract market shall—

(1) Promptly furnish the Secretary of Agriculture copies of all by-laws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, and of all changes and proposed changes therein. . . ."

§ 9. *Exclusion of persons from privilege of "contract markets"; procedure for exclusion; review by court of appeals*

If the Secretary of Agriculture has reason to believe that any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market, or has willfully made any false or misleading statement of a material fact in any registration application or any report filed with the Secretary of Agriculture under this chapter, or willfully omitted to state in any such application or report any material fact which is required to be stated therein, or otherwise is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, he may serve upon such person a complaint stating his charges in that respect, which

complaint shall have attached or shall contain therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made prohibiting him from trading on or subject to the rules of any contract market, and directing that all contract markets refuse all trading privileges to such person, until further notice of the Secretary of Agriculture, and to show cause why the registration of such person, if registered as futures commission merchant or as floor broker hereunder, should not be suspended or revoked. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the Secretary of Agriculture, or before a referee designated by the Secretary of Agriculture, which referee shall cause all evidence to be reduced to writing and forthwith transmit the same to the Secretary of Agriculture. Upon evidence received, the Secretary of Agriculture may prohibit such person from trading on or subject to the rules of any contract market and require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order, and, if such person is registered as futures commission merchant or as floor broker hereunder, may suspend, for a period not to exceed six months, or revoke, the registration of such person. Notice of such order shall be sent forthwith by registered mail or by certified mail or delivered to the offending person and to the governing boards of said contract markets. After the issuance of the order by the Secretary of Agriculture, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing

in the United States court of appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the Secretary of Agriculture be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Secretary of Agriculture and thereupon the Secretary of Agriculture shall file in the court the record theretofore made, as provided in section 2112 of Title 28. Upon the filing of the petition the court shall have jurisdiction to affirm, to set aside, or modify the order of the Secretary of Agriculture, and the findings of the Secretary of Agriculture as to the facts, if supported by the weight of evidence, shall in like manner be conclusive.

§ 12a. *Registration of commission merchants and brokers; fees; rules and regulations; publication of harmful acts; disapproval of by-laws, etc.*

The Secretary of Agriculture is authorized—

(1) to register futures commission merchants and floor brokers upon application in accordance with the rules and regulations and in form and manner to be prescribed by the Secretary of Agriculture; and

(2) to refuse to register any person—

(A) if the prior registration of such person has been suspended (and the period of such suspension shall not have expired) or has been revoked;

(B) if it is found, after opportunity for hearing, that the applicant is unfit to engage in the business for which the application for registration is made, (i) because such applicant, or, if the applicant is a partnership, any general partner, or, if the applicant

is a corporation, any officer or holder of more than 10 per centum of the stock, at any time engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or was debarred by any agency of the United States from contracting with the United States, or the applicant willfully made any material false or misleading statement in his application or willfully omitted to state any material fact in connection with the application, or (ii) for other good cause shown; or

(C) in the case of an applicant for registration as futures commission merchant, if it is found after opportunity for hearing that the applicant has not established that he meets the minimum financial requirements under section 6f of this title; *Provided,* That pending final determination under clause (B) or (C), registration shall not be granted; *And provided further,* That the applicant may appeal from a refusal of registration under clause (B) or (C) in the manner provided in section 9 of this title; and

(3) in accordance with the procedure provided for in section 9 of this title, to suspend or revoke the registration of any person registered under this chapter if cause exists under paragraph (2) (B) or (C) of this section which would warrant a refusal of registration of such person, and to suspend or revoke the registration of any futures commission merchant who shall knowingly accept any order for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market from any person if such person has

been denied trading privileges on any contract market by order of the Secretary of Agriculture under the provisions of section 9 of this title and the period of denial specified in such order shall not have expired; and

(4) to fix and establish from time to time reasonable fees and charges for registrations and renewals thereof; and

(5) to make and promulgate such rules and regulations as, in the judgment of the Secretary of Agriculture, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of this chapter;

(6) to communicate to the proper committee or officer of any contract market and to publish, notwithstanding the provisions of section 12 of this title, the full facts concerning any transaction or market operation, including the names of parties thereto, which in the judgment of the Secretary of Agriculture disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers and consumers; and

(7) to disapprove any bylaw, rule, regulation, or resolution made, issued or proposed by a contract market or by the governing board thereof or any committee which relates to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relates to other trading requirements, when he finds that such bylaw, rule, regulation, or resolution violates or will violate any of the provisions of this chapter, or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder.